United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

74-2126

United States Court of Appeals

For the Second Circuit

JOAN HULL, on behalf of herself and others similarly situated,

Plaintiff-Appellant,

against

CELANESE CORPORATION, CELANESE FIBERS MARKETING CO.; JOHN W. BROOKS, VERNON E. JORDAN, GRAYSON M.-P. MURPHY and DR. JEROME B. WIESNER, Officers and Directors of CELANESE CORPORATION; and ALLAN R. DRAGONE, President of CELANESE FIBERS MARKETING CO.,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

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APPELLEES' BRIEF

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UNITED STATES COURT OF APPEALS

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No. 74-2126

JOAN HULL, on behalf of herself and others similarly situated,

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Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

ISSUE PRESENTED

Whether the District Court abused its discretion in disqualifying plaintiff's attorney where it also represented a member of defendant's legal staff who endorsed plaintiff's charges and sought to join plaintiff in the prosecution of the charges herein after acting in the defense of this very case.

STATEMENT OF THE CASE

This is an appeal from an order of the District Court (Richard Owen, J.) entered on July 17, 1974, disqualifying the

firm of Rabinowitz, Boudin and Standard (the "Rabinowitz firm"), counsel for Joan Hull ("Hull"), plaintiff-appellant herein. The Court's opinion and order have not been officially reported, and are set out in the Appendix at pp. 293a-301a.*

Hull is an employee of defendant Celanese Fibers Marketing Company ("CFMC"), a division of the defendant Celanese Corporation ("Celanese"). On or about August 24, 1973, Hull filed her complaint herein charging Celanese, CFMC and two officers and three directors of Celanese with violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., because of alleged discrimination against plaintiff and members of a class claimed to be represented by her on the basis of sex (2a). Hull claims to represent a class comprising female employees of and applicants for positions with CFMC (3a-4a).

The defendants have answered, denying the material allegations of the complaint (38a).

On March 13, 1973, Hull and five other employees of CFMC and other Celanese divisions in New York moved (i) for an order permitting the filing of an amended complaint; (ii) for an order that the action be maintained as a class action and that the class be expanded beyond CFMC to include all female applicants and employees at Celanese's New York headquarters; and (iii) for leave for the five other employees to intervene as plaintiffs. One of

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* References to "a" are to pages in the joint appendix.

the proposed intervenors was Donata A. Delulio ("Delulio"), a lawyer on the Celanese corporate staff (49a).

As will be set forth at greater length below, Delulio had acted as one of the attorneys for Celanese* in the defense of the Hull matter. Charging that Celanese had discriminated against her because of her sex, Delulio retained plaintiff's counsel, the Rabinowitz firm, and sought to join plaintiff's side of the very case she had defended.

Delulio moved to intervene as a plaintiff in the Hull case notwithstanding an opinion from the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York ("the Committee") that such intervention would be improper (126a). In attempting to intervene, she joined Hull in charging in a proposed amended complaint that Celanese had discriminated against Hull and others pursuant to an unlawful pattern and practice of sex discrimination (60a-84a). Delulio also filed an affidavit stating that Celanese had in fact engaged in unlawful discrimination against Hull (90a-91a).

On March 27, 1974, defendants cross-moved to deny Delulio's application to intervene, to disqualify the Rabinowitz firm and to strike the class action allegations (98a). Defendants' motions were based on the risk that confidential information received by Delulio, as Celanese's attorney, might be used against Celanese in the course of the prosecution of the joint Hull-Delulio

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* As hereinafter referred to, references to Celanese in its capacity as a defendant herein are also intended to include the individual defendants.

claims (111a-112a, 135a-136a, 207a-219a). Defendants' cross-motions were argued on April 19, 1974, at which time the Court ruled from the bench that Delulio could not intervene. This ruling was incorporated into a written opinion and order filed on May 6, 1974 (286a).

On July 17, 1974, the District Court issued an opinion and order disqualifying the Rabinowitz firm on the ground that by representing both Hull and Delulio in the prosecution of their joint charges of sex discrimination, the firm had violated Canon 9 of the Code of Professional Responsibility which proscribes conduct that has the appearance of impropriety. The Court stated that the Rabinowitz firm had placed itself in a position in which it might be the recipient of confidences which Delulio had obtained in the course of representing Celanese in this very case, and that there was evidence which indicated the possibility of the disclosure of such confidences, consciously or unconsciously, by Delulio (293a-301a).

STATEMENT OF FACTS

The facts set forth herein are derived from the pleading and the affidavits submitted in support of and in opposition to plaintiff's and defendants' motion with regard to intervention. Since the issues on appeal turn in large measure on the activities and conduct of Delulio, as well as her relationship to the Hull case and the Rabinowitz firm, we shall set out the facts relating thereto in some detail. They are unique, if not bizarre, involving (1) Delulio's participating on the defendants'

side as an attorney for Celanese in this case and related matters, and (ii) Delulio's activities on the plaintiff's side of this case.

The critical facts with respect to Delulio's participation on the plaintiff's side of this case are undisputed. They are found in the affidavits filed by or on behalf of Delulio and Hull, as well as in statements and admissions by Delulio, Hull and the Rabinowitz firm.

There are some differences between the parties with respect to the facts relating to Delulio's participation in the defense of this case and related matters. These differences arise largely from Delulio's attempt to deny or downgrade her activities on the defendants' side after defendants' motion to prevent her intervention because of those activities.

The critical facts with respect to Delulio's activities in the defense of this case are, however, basically undisputed. They appear from (i) Delulio's own statements and admissions about her activities; (ii) unchallenged contemporaneous documents and (iii) statements made by others and not denied by Delulio. We shall indicate, where appropriate, the nature and extent of disputed matters.

A. Delulio's Activities in Defense of this Case, and Related Matters

Delulio became a member of the Celanese Law Department in July 1972 (90a, 105a).

In or about February 1973, Delulio was assigned, as one of her duties, the task of advising the Celanese Minority Relations Department which has the responsibility for matters relating to equal employment opportunity, such as affirmative action and claims of race and sex discrimination (105a). In the course of her duties, Delulio consulted from time to time with members of the Minority Relations Department, gave advice with respect to problems in the area of that Department's responsibilities and also participated on behalf of Celanese in the defense of claims of race and sex discrimination (107a, 140a, 147a-149a, 167a, 176a, 243a).*

Delulio began to work on the Hull matter in or about February 1973, at which time it was pending before the New York State Division of Human Rights ("the Division")(105a, 229a, 242a).

As part of her activities with respect to the Hull case, Delulio participated in the preparation of a proposed conciliation agreement with Hull [illegible]e submitted to the Division in or about

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* There is a dispute with respect to the extent of Delulio's services for the Minority Relations Department. Benjamin H. Sands and Sidney Brockman of the Department state in their affidavits that they consulted regularly with Delulio, that they supplied her with documents and that she had complete access to the Department's files (147a-149a, 243a-244a). Delulio does not deny consulting with Sands and Brockman, but states that she was "never supplied with any...documents...had no access to the department files" (175a).

April 1973 (29a, 105a, 140a, 173a).* She also worked briefly on an appeal from a finding of probable cause by the Division (106a).

In or about early July 1973, James Scott Hill, then Vice President and General Counsel of Celanese, requested Delulio to prepare a comprehensive memorandum of fact and law on the Hull case (106-107a, 166a, 225a). In the course of preparing the memorandum, Delulio interviewed persons with knowledge of the facts, and, in her own words:

> "thoroughly reviewed the Joan Hull files in both the Law Department and the Personnel Department of Celanese Fibers Marketing Company" (212a).

Attached to Delulio's 20-page memorandum were numerous documents culled by her from the Law Department and CFMC Personnel Department files, including memoranda of counsel (210a-211a).

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* There is a dispute with respect to the precise nature of Delulio's work on the agreement. According to Delulio:

> "...in or about April, I was shown a proposed conciliation agreement for the Hull case. I proposed a few grammatical and stylistic changes but had no part in negotiating or formulating the substantive aspects of that proposal." (163a)

Delulio does not explain how she came to learn about the agreement or what she was told about it. Four Celanese executives, Ronald Wright and Lloyd Sims, of the CFMC Personnel Department; Robert Wylie, Vice President of CFMC and Sidney Brockman of the Minority Relations Department all state that Delulio attended several meetings on the matter, during which they discussed the proposed agreement, Celanese's defense strategy and other confidential matters (140a, 230a, 233a-234a, 243a).

Throughout the spring and summer of 1973, in the course of her duties on the Hull case, Delulio met and had telephone communications with Richard Adelman, Esq., of Battle, Fowler, Stokes, and Kheel, outside counsel for Celanese on the Hull matter (162a, 164a, 234a). Later, she met with Gilbert S. Edelson ("Edelson") of Rosenman Colin Kaye Petschek Freund & Emil, which replaced the Battle, Fowler firm in early August (109a-110a, 167a, 212a, 216a). She also met periodically on matters relating to the Hull case with Ronald Wright and Lloyd E. Sims of the CFMC Personnel Department and Sidney Brockman and Benjamin H. Sands of the Celanese Minority Relations Department (140a, 147a-149a, 164a-165a, 230a-231a, 237a, 243a).*

Delulio attended and participated in an interview of Robert Wylie, a Vice President of CFMC and Hull's superior (213a-214a, 234a-235a)** She also attended an interview of Homer Klock,

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* Delulio's affidavit states that these meetings did not relate to the Hull case or that what she characterizes as "nothing of substance" occurred (159a, 162a, 164a, 167a). The affidavits of the other participants differ from hers, asserting that the meetings were directly concerned with the facts of and defense strategy in the Hull case, and that they made confidential disclosures to Delulio, as Celanese's lawyer, at those meetings (101a, 139a, 141a, 147a-148a, 214a, 216a, 230a, 234a, 243a).

** Delulio's letter to the Committee describing her work on the Hull case states:

> "I attended on [sic] interview of the employee's [Hull's] superior." (131a)

Her affidavit also states that she attended a meeting at which Wylie was interviewed on what she describes as "the general problem of fair employment practices", but denies that the meeting had anything to do with the Hull case (167a-168a, 180a). The affidavits of Wylie and others state that the meetings directly concerned the Hull case (141a, 214a, 235a, 237a, 243a).

formerly Director of Personnel of CFMC, and a prospective witness with knowledge of the facts relating to Hull (180a, 213a-214a).

There is some question of when Delulio stopped working on the Hull matter. Her affidavit is self-contradictory. It states at one point that she did no work after the complaint was filed (on August 24, 1973) (175a), and at another that she attended a meeting after the complaint was filed at which she met Edelson, and that she thereafter had two conversations with him "relating to entirely peripheral aspects of the case" (167a-168a).

Edelson's time records, which are unchallenged, show a total of at least four meetings and five telephone conversations with Delulio after the complaint was filed (109a-110a, 212a-215a). Those records place Delulio at meetings at which one or more of Messrs. Wylie, Klock, Wright, Sims and Sands, all Celanese executives with knowledge of the facts of this case, were present and at which the facts relating to the case and defense strategy were discussed.

Delulio summarized her services on the Hull matter in her letter to the Committee of January 29, 1974, setting forth her version of the facts as follows:*

> "In February of 1973 I was assigned in part, secondary responsibility for employment discrimination actions against the corporation and its divisions and in that connection I

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* Delulio's affidavit, contradicting her statement to the Committee, denies that she had access to information concerning salaries and hiring practices or "any other similar material
(footnote continued on next page)

began to work on an on-going case of a female employee of one of the divisions who had filed charges of sex discrimination against the corporation and the division with Federal and State agencies."

* * *

"During the six months that I worked on that case I studied the general regulations of the Equal Employment Opportunities Commission, its procedures and the law on sex discrimination generally. I obtained specific information from the personnel department of the division concerning salaries and hiring practices. I attended on [sic] interview of the employee's superior, and attended one interview of another division employee. I participated in a conference with outside consultants hired by the corporation to prepare statistical information regarding employment within the division. I obtained inter-office memoranda and prepared a memorandum myself regarding the case." (131a)

In addition to her work on this case, Delulio was consulted on a matter relating to Marilyn Karnes ("Karnes"), another proposed intervenor and co-plaintiff in the Hull case (108a, 141a, 180a). In or about the spring of 1973, a long-standing dispute between Karnes and a number of her superiors re-emerged. Because the matter had possible "equal employment" ramifications, it was believed appropriate to consult Delulio as a member of the Celanese Law Department. Delulio attended a meeting in April at which were

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(footnote continued from previous page)
which would be relevant in defending the company against discrimination charges". (173a-174a). In addition, Delulio avers in her affidavit that, notwithstanding (i) the many months in which she acted as attorney for the Celanese Minority Relations Department, (ii) her "thorough review" of the files of CFMC and the Celanese Law Department in connection with the preparation of her memorandum of law and fact on this case, and (iii) the numerous meetings she admittedly participated in and conversations she had with respect to this case, she did not acquire any confidential information (180a-181a), although she "might have evidence that would be protected by the attorney-client privilege" (158a).

present Ronald Wright and Lloyd E. Sims of the CFMC Personnel Department and Karnes' supervisors (231a-232a, 234a, 237a, 241a). A memorandum of the meeting prepared by Sims states:

> "The meeting was to review the current status of Ms. Karnes and to determine the next course of action." (241a)

Delulio admits attending the meeting, denies that she discussed what she describes as "the merits of the case" and reveals in her affidavit that she was told by her clients

> "that the corporation hoped to encourage Ms. Karnes to leave." (180a)

B. Delulio's Activities on the Plaintiff's Side of this Case

In early October 1973, Delulio was given a new assignment in the Law Department, which she had requested, and was relieved of her duties with respect to the Hull case and the Celanese Minority Relations Department (93a, 226a).

In November 1973, Delulio went to Hull and requested the name, address and telephone number of Hull's attorneys, the Rabinowitz firm (184a). She consulted Ms. K. Randlett Walster ("Walster") of the Rabinowitz firm on November 9, 1973, with respect to a possible claim of discrimination against Celanese (191a-192a). At that time, the Rabinowitz firm also represented a number of the other proposed intervenors (192a). Delulio informed Walster that she had acted for Celanese on the Hull case. Nevertheless, the Rabinowitz firm decided to represent Delulio with the understanding that Delulio would not reveal "anything of a confidential

nature" regarding her previous work on the Hull matter (192a).* Thereafter, Hull and Delulio discussed the case between themselves, amongst the other intervenors and with their counsel (184a).

On or about November 15, 1973, Delulio filed charges of discrimination against Celanese, and certain officers, directors and employees of the company (95a-96a, 110a, 192a). However, Delulio withheld from Celanese the fact that such charges had been filed (110a, 227a-228a).

Edelson attended the 1973 Christmas luncheon of the Celanese Law Department on December 17, 1973, at which time he sat next to Delulio and discussed recent developments in the Hull case with her, unaware that she had filed charges and retained the Rabinowitz firm (110a, 138a). Delulio has denied that this conversation took place. Her affidavit states that although she sat next to Edelson at the luncheon,

> "...we did not discuss the Hull case. Many other attorneys were present and the conversation was social and not related to business." (174a)

On December 19, 1974, two days after the luncheon, however, Delulio wrote to James Scott Hill, then Vice President, Secretary and General Counsel of Celanese (111a, 138a, 218a, 227a).

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* The reason for this condition is not clear since Delulio denies that she has any confidential information, a denial accepted by the Rabinowitz firm (181a, 270a). Delulio, Hull and the lawyers of the Rabinowitz firm deny that Delulio disclosed confidential information (157a, 184a, 189a-190a, 193a, 195a-206a).

Her letter states that she had sat next to Edelson at the luncheon, that the Hull case had been mentioned by him and, consequently, she felt it necessary to advise Hill that she had filed charges with the EEOC and that she "may wish to intervene in the Hull case." (138a)

In early 1974, Edelson informed Walster, in two separate conversations, that the representation of both Hull and Delulio by the Rabinowitz firm raised questions under the Code of Professional Responsibility (111a). At or about the same time, Robert A. Longman, newly appointed Vice President, Secretary and General Counsel of Celanese met with Delulio on two occasions, and informed her that her participation on plaintiff's side in the Hull case would be a conflict of interest (135a, 136a)*.

On January 29, 1974, Delulio wrote to the Committee setting forth her version of her services in the Hull matter, stating that she intended to intervene and requesting its opinion about her professional responsibilities under the Code of Professional Responsibility (131a-132a). On March 12, 1974, the Committee responded, stating inter alia that Delulio could not properly intervene as a plaintiff in the Hull case (126a).

On March 13, 1974, Delulio, through her attorneys, the Rabinowitz firm, moved to intervene in the Hull case as a co-

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* Delulio's affidavit states that Longman said that there would probably be no conflict problem if she participated on plaintiff's side of the case (178a).

plaintiff, together with Hull, Karnes and three other female employees of Celanese (49a). The motion also sought leave to file a proposed amended complaint which alleged that Hull, Delulio and the other intervenors were all victims of the same pattern and practice of sex discrimination by Celanese, and sought to expand the class to include all female Celanese employees at the Celanese New York Headquarters (60a).

In an affidavit sworn to on March 12, 1974, and submitted in support of the motion, Victor Rabinowitz of the Rabinowitz firm stated that after Delulio and another female Celanese employee came forward with claims of sex discrimination

> "...it became apparent that the discriminatory policies to which Ms. Hull had been subjected were not confined to one division of the corporation but permeated its employment policies ..." (53a)

* * *

> "The proposed amended complaint integrates the intervenors' particular grievances into the format of the initial complaint." (57a)

In an affidavit sworn to on February 28, 1974, and submitted in support of the motion to intervene and to file an amended complaint, Delulio endorsed Hull's charges that she had been discriminated against by Celanese stating:

> "I, like plaintiff Hull, have been subjected to various forms of sex discrimination by the defendant, Celanese, particularly with respect to hiring, promotions, and transfers, salary and raises, training and education programs, public relations and client good-will activities. (91a)"

* * *

> "I believe that the discrimination to which I have been subject is basically the same as that complained of by plaintiff Hull. My experience as a member of the Celanese corporate staff leads me to believe that the defendants discriminate against women in all divisions and at all levels of employment at Celanese." (96a-97a)

Defendants thereupon cross-moved to (i) deny Delulio's application for intervention and to strike the allegations relating to Delulio from the proposed amended complaint; (ii) disqualify the Rabinowitz firm; and (iii) strike the class action allegations (98a).

In response, it was argued that (i) Delulio was not bound by the Committee's opinion (160a), (ii) notwithstanding her thorough review of the files and admitted attendance at many meetings over a more than six month period she had acquired no confidential information whatsoever (181a, 261a-262a); (iii) the statements of counsel and others with respect to her activities were "Baldfaced lies" (174a), and (iv) there was no impropriety in her joinder in and support of Hull's charges against her client, Celanese (248a-262a). It was also claimed that Delulio had made no disclosure to her lawyers, the Rabinowitz firm, of confidential information acquired by her in the course of her duties as Celanese's lawyer since, according to Delulio, she had based her case on her own experience and observation as an employee and not on information received during her employment as a lawyer (158a-159a).

The cross-motion came on for oral argument on April 19, 1974, at which time the District Court denied Delulio's motion for intervention from the bench. That ruling was confirmed in

a written opinion and order filed on May 6, 1974 (286a).

Thereafter, on or about May 16, 1974, the Rabinowitz firm informed the Court in the course of a memorandum that, although it believed the decision on Delulio to have been in error, no appeal would be taken and that Delulio would seek new representation.

On July 17, 1974, the Court issued an order disqualifying the Rabinowitz firm on the ground that there was a violation of Canon 9 of the Code of Professional Responsibility which proscribes conduct that creates the "appearance of impropriety" (293a). The Court held that the contents of the affidavits prepared by Delulio and the Rabinowitz firm, in which Delulio charges Celanese with unlawful discrimination against Hull indicated:

> "...the possibility that Delulio, unquestionably possessed of information within the attorney-client privilege, did in fact transmit some of it to the Rabinowitz firm, consciously or unconsciously." (297a)

The Court concluded:

> "In this connection, while I give full credit to the Rabinowitz attorney's affidavits, asserting an effort to avoid the disclosure to them of any confidential information from Delulio, and their belief that they succeeded, I feel that they were remiss in not immediately recognizing either the substantial risk of actual disclosure, or the fact that their retention would create the 'appearance of impropriety' because of the opportunity for improper disclosure. I conclude that as between Hull's interest in the firm's continuing to represent her, the public's interest in the scrupulous administration of justice, and Celanese's interest in its freedom from risk of use against it of privileged information, and noting that Celanese

had no knowledge of the firm's retainer until over a month later, the interests of Celanese and the public must be given preference.

"Consequently, I am unwilling, against this background, to impose upon Celanese the slightest risk of even unintentional use against it of privileged information learned by Delulio while a member of its legal staff working on this very case." (299a-300a)

ARGUMENT

THE TEST TO BE APPLIED IS WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION.

When a charge is made that an attorney has violated his or her professional responsibilities, it is the duty of the District Court to examine the charge, since it is that Court which is authorized to supervise the conduct of the members of its bar. The power of the Court to disqualify lawyers is based upon its general supervisory powers. Richardson v. Hamilton International Corp., 469 F.2d 1382 (3d Cir. 1972), cert. denied, 411 U. S. 986 (1973); Estates Theatres Inc. v. Columbia Industries Inc., 345 F. Supp. 93 (S.D.N.Y. 1972); Empire Linotype School, Inc. v. United States, 143 F. Supp. 627 (S.D.N.Y. 1956). The District Court herein has not specifically adopted the Code of Professional Responsibility. Nonetheless, the Code is recognized as setting forth proper standards of professional conduct. Handelman v. Weiss, 368 F. Supp. 258 (S.D.N.Y. 1973); Estates Theatres, Inc. v. Columbia Industries, Inc., supra. And, as the Court in Handelman v. Weiss, supra, stated "... questionable behavior will not be permitted merely because it is not directly covered by the Canons." (368 F. Supp. at p. 263).

A decision by a District Court to disqualify counsel is a matter of the court's discretion, which can only be overturned upon a showing of abuse. This Court recognized that principle in

Tucker v. Shaw, 378 F. 2d 304 (2d Cir. 1967), where disqualification because of a potential conflict of interest was upheld. The Court there stated: "... it was clearly within the discretion of the district judge to nip any potential conflict of interest in the bud." (at 307). See also, Autowest, Inc. v. Peugeot, Inc., 434 F.2d 556, 567 (2d Cir. 1970).

The Court of Appeals for the Third Circuit, in Richardson v. Hamilton International Corp., 469 F.2d 1382 (3rd Cir. 1972), expanded on the philosophy of this rule, stating:

> "Whenever an allegation is made that an attorney has violated his moral and ethical responsibility, an important question of professional ethics is raised. It is the duty of the district court to examine the charge, since it is that court which is authorized to supervise the conduct of the members of its bar. The courts, as well as the bar, have a responsibility to maintain public confidence in the legal profession. This means that a court may disqualify an attorney for not only acting improperly but also for failing to avoid the appearance of impropriety.
>
> We have held that the regulation of attorneys appearing before the district court in these matters will be disturbed only when, on review of the record, we can say that the district court abused its permissible discretion. Greene v. Singer, 461 F.2d 242 (3d Cir. 1972); cert. denied, 409 U.S. 848, 93 S. Ct. 54, 34 L.Ed.2d 89, (Oct. 10, 1972).
>
> On this record the district court has not exceeded the bounds of its permissible discretion, and the above-mentioned November 3, 1971, order .... will be affirmed." (Footnotes omitted.) (at 1385-86)

See also: Allied Realty of St. Paul, Inc. v. Exchange Nat. Bank, 408 F.2d 1099 (8th Cir. 1969); Waters v. Western Co. of N.A., 436 F.2d 1072 (10th Cir. 1971).

It is clear from the above cases that the abuse of discretion standard should properly be applied here.* And we believe the discussion below shows plainly that there has been no showing of an abuse of discretion in this case.

Moreover, it has been stated that in close cases, doubt is to be resolved in favor of disqualification, Fleischer v. A.A.P. Inc., 163 F.Supp. 548, 552-53 (S.D.N.Y. 1958), app. dismissed sub nom. Fleischer v. Phillips, 264 F.2d 515 (2d Cir. 1959). As we shall show, this is not a close case; disqualification was clearly called for on the facts herein.

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* "Generally, an appellate court may set aside a trial court's exercise of discretion only if the exercise of such discretion could be said to be arbitrary." Sears, Roebuck and Co. v. American Mut. Liab. Ins. Co., 372 F.2d 435, 438 (7th Cir. 1967).

"[D]iscretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion." Delno v. Market St. Ry., 124 F.2d 965,967 (9th Cir. 1942).

POINT II

DELULIO'S SUPPORT AND ENDORSEMENT OF HULL'S CHARGES WAS IMPROPER AND WAS ABETTED BY THE RABINOWITZ FIRM'S REPRESENTATION OF BOTH.

A. Delulio's Endorsement, Support and Joinder in Hull's Charges Constitutes a Violation of Delulio's Responsibilities Under Canon 5 of the Code

The keystone of appellant's argument is the propriety of Delulio's conduct. It was urged at considerable length below, and it is now urged that Delulio has committed no impropriety. It is claimed that Delulio has constitutional and statutory rights to bring a claim of sex discrimination against Celanese, and to select her own counsel to enforce her rights. It is argued that there is therefore no basis for disqualification. This argument misses the point and obscures the real issues.

The real issue with regard to the propriety of Delulio's conduct is not whether Delulio has a right to assert claims against Celanese. The issue is, rather, whether Delulio had a right to support, endorse and join in Hull's charges that she (Hull) was unlawfully discriminated against by Celanese, when Delulio acted as one of the lawyers for Celanese in the defense of that very charge.

This issue involves nothing less than a first principle of legal ethics. A lawyer has a basic obligation of loyalty and fidelity to his or her client. Consonant with that obligation, a lawyer may not represent another party in an action against that

lawyer's client, which the lawyer has defended against.

Canon 5 of the Code of Professional Responsibility deals with the lawyer's obligation of loyalty to a client. The relevant Ethical Considerations are EC 5-1 and EC 5-2, which provide in relevant part:

> "EC 5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, nor the desires of third persons should be permitted to dilute his loyalty to his client.
>
> EC 5-2 A lawyer should not accept proferred employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from ... assuming a position that would tend to make his judgment less protective of the interests of his client."

The following actions demonstrate Delulio's violation of her professional obligations under Canon 5:

1. Delulio's motion to intervene constituted an attempt to join Hull in the assertion of the same charges made by Hull against Celanese which Delulio had defended as a Celanese lawyer.

2. The proposed amended complaint, in which Delulio joined Hull in charging that Celanese engaged in an alleged broad pattern and practice of sex discrimination against Hull, Karnes and Delulio's other proposed co-plaintiffs, constituted a public

endorsement of and support for those charges by one of the lawyers who had been engaged in the defense of those very charges.

3. Delulio's affidavit submitted in support of the motion by her, Hull and the other proposed intervenors, in which she made sworn statements that Celanese in fact was guilty of unlawful sex discrimination against Hull, constitutes a further public endorsement and support of Hull's charges by one of the lawyers engaged in the defense of those charges.

4. On May 29, 1974, after the District Court's decision denying Delulio's application to intervene, she and Hull made a joint appearance and speeches at a meeting of the Financial Women's Association of New York. According to the announcement of the meeting they discussed "their reasons for filing formal complaints against their current employer [and] the company's reaction." This joint appearance again constituted an endorsement by Delulio of Hull's charges (a copy of the announcement of this meeting is annexed as Exhibit A).*

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* On April 11, 1974, Delulio and Hull attended the Celanese Annual Meeting together and their photograph appeared prominently accompanying the article in the New York Times of April 12, 1974 describing the meeting. The article states in part:

> "Last summer, Miss Hull instituted a class action in Federal court charging Celanese with sex discrimination. The litigation involves five other professional employees, one of whom, Donata Delulio, is an associate general counsel for the corporation."

A copy of this article is annexed as Exhibit B.

The effect of Delulio's actions was to make it appear that, having investigated Hull's charges against Celanese, Delulio determined them to be true and thereupon joined Hull in their common battle to secure women's rights. That this appearance was conveyed, and that Celanese was thereby prejudiced, is apparent from an article which appeared on the front page of the Wall Street Journal of August 2, 1974, which did not originate with Celanese, and which describes the situation as follows:

> "Three years ago, for example, Celanese Corp. formed a blue-ribbon committee of its top brass to oversee [an affirmative action] program after Joan Hull, a manager in the company's fibers division, filed a sex discrimination complaint against the company with the New York State Division of Human Rights. But the committee's efforts weren't sufficient to prevent Miss Hull from bringing her case to court last summer. Surprised, Celanese turned the suit over to its legal department to determine whether the case had merit. Donata Delulio, Celanese's associate general counsel, took one look at the suit and promptly filed a sex discrimination complaint on her own behalf with the EEOC, as the federal agency is commonly called."

(A copy of this article is annexed hereto as Exhibit C).

More recently, an article in the New York Times of December 24, 1974 which also did not originate with Celanese, states:

> "As a member of the corporate legal staff, Miss Delulio has represented Celanese in the long-standing battle with Joan Hull, a merchandising manager in its fibers division who charged the company with sex discrimination. In the process, Miss Delulio's consciousness apparently was raised.
>
> She tried last February to intervene in the class action Miss Hull instituted against Celanese in July, 1973."

(A copy of this article is annexed as Exhibit D).*

Delulio's statements that her clients are guilty of the charges she has defended them against, and her attempt to join Hull in her case against them are plain violations of her duty of loyalty to her client required by Canon 5. Her view that the interests of Hull come before those of her client is in direct conflict with the Canon.

If Delulio believed herself to be aggrieved by Celanese's action she should properly have consulted counsel other than Hull's and litigated her claims in a separate action. Delulio could thus have attempted to vindicate her claims without prejudicing her client in the Hull case. **

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* Delulio was critical of her client in a statement to the New York Times which appeared on January 20, 1974 and in which Delulio is quoted as stating

> "Corporations react to courts and to money ..... I'm sorry it had to come to this, but I'm not sorry I brought suit." (123a)

**Delulio, who has been terminated by Celanese, has now done just that. She has commenced her own action in the District Court, employing other counsel, in which she alleges that Celanese and certain individuals discriminated against her because of her sex and also that defendants engaged in retailiation against her by, inter alia, openly questioning the properiety of her action in attempting to intervene in Hull.

It is urged that Delulio's conduct is protected by her "First Amendment right to freedom of expression and association." (Appellant's brief, p. 43) Of course, as is explained at p. 61, infra, First Amendment activities must be balanced against competing public policies. Here, there is a strong competing public policy -- the maintenance of the legal system through the enforcement of lawyers' professional obligations of loyalty to their clients. We know of no case which holds that a lawyer who has defended a client against certain charges may turn on the client and, without the client's consent, make a public statement that the client is guilty as charged. To enunciate such an argument is to demonstrate its fallacy.

It is also urged that Delulio could properly join with Hull and support Hull's case because of "[c]onsiderations of judicial economy and effective vindication of employees' rights ....." (Appellant's brief, p. 48). The Code and the cases make it clear, however, that such considerations are subordinate to the fundamental right of a client to be protected against its lawyer joining an adversary in the case against the client.

B. The Rabinowitz Firm Abetted Delulio's Violation of her Professional Responsibilties

The vehicle by which Delulio was enabled to endorse, support and join in Hull's charges was the joint Hull-Delulio representation by the Rabinowitz firm.

Delulio consulted the Rabinowitz firm in October 1973 knowing that the firm was representing Hull against Celanese.

She informed the firm that she had acted as one of Celanese's lawyers in the Hull case. At that point, the duty of the Rabinowitz firm was clear. It should have declined to represent Delulio and should have suggested to her that she seek other counsel because of the obvious risk of a joinder in interest of Hull and Delulio against Celanese. It should likewise have counselled Hull against such a joinder. Instead, the Rabinowitz firm agreed to represent Delulio and, further, proceeded to become the means by which Delulio joined Hull in pressing charges against Celanese.

The Rabinowitz firm counselled Delulio that she could properly endorse Hull's charges against Celanese. Through the mechanism of their representation by the Rabinowitz firm, Delulio, Hull and the other intervenors met and jointly discussed among themselves and with counsel the prosecution of their cases against Celanese. The Rabinowitz firm (i) prepared and filed the motion in which Delulio sought to join Hull in asserting charges against Celanese, (ii) prepared and filed the proposed amended complaint in which Delulio endorsed and joined in Hull's charges against Celanese and (iii) reviewed and filed the affidavit in which Delulio swore that Celanese had in fact discriminated against Hull. The Rabinowitz firm's representation of both Hull and Delulio was therefore in conflict with Canon 9 of the Code of Professional Responsibility, which states that "A lawyer should avoid even the appearance of professional impropriety".

It is argued by appellant that the application of

this Canon should be restricted. It is urged that the Canon should be limited to cases ".... where there is a substantial risk that the attorney has violated or may violate another specific Canon of the Code, usually Canon 4", and that there "....cannot be a claim that the Rabinowitz firm violated or could violate another provision of the Code." (Appellant's brief, pp. 15, 16)

The Ethical Considerations under Canon 9 expressly contemplate situations where there is no precise precedent and where an attorney must use his own judgment in determining the proper course of conduct. Thus EC 9-2 provides in relevant part:

> "When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession."

In addition, EC 9-6 provides:

> "Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and judges thereof; to observe the Code of Professional Responsibility; . . . to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety."

It is thus clear that Canon 9 does not contemplate that the "appearance of impropriety" could occur only under rigid, well-defined circumstances.

It is plain that in undertaking the joint Hull-Delulio representation, which enabled Delulio to breach her professional obligations to her client, the Rabinowitz firm did not act "in

a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession" as is required by EC 9-2. In assisting and becoming the means by which Delulio was enabled to violate Canon 5, the Rabinowitz firm violated the spirit and the letter of Canon 9. The argument that disqualification is improper because no such violation occurred is, therefore, erroneous.

We do not imply that the Rabinowitz firm consciously or intentionally engaged in improper practices. On the contrary, we believe that the lawyers in that firm acted in good faith, without any intention of violating the Code and in the belief that no such violation had occurred. Nonetheless, the effect of their representation of both Hull and Delulio was to further Delulio's improper conduct.

POINT III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISQUALIFYING THE RABINOWITZ FIRM BECAUSE OF THE RISK THAT CONFIDENTIAL INFORMATION ACQUIRED BY DELULIO MIGHT BE USED AGAINST DEFENDANTS.

A. Where There is a Risk that Confidential Information Acquired by a Lawyer may be Used Against the Client in a Litigation, The Lawyer and Other Lawyers with whom he had Close Professional Contact will be Disqualified

The right of a client to consult freely with his lawyer is founded on the obligation of the lawyer to preserve confidences imparted by the client. In protecting the client against the disclosure of such confidences and their use against the client, the public interest in the proper functioning of the legal system and in the administration of justice is also protected.

The public policy protecting both the client and the public interest is reflected in Canon 4 of the Code which states that "A lawyer Should Preserve the Confidences and Secrets of a Client." The relevant Ethical Considerations, EC 4-1 and 4-5, state in relevant part:

> "EC 4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally

free to obtain information beyond that volunteered by his client.... The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes."

DR 4-101 requiring the preservation of confidences and secrets defines those terms as follows:

"(A) 'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to client."

The cases make it plain that the term "confidence" is to be liberally interpreted. In Marco v. Dulles, 169 F. Supp. 622 (S.D.N.Y. 1959), the court said at p. 629:

"The words 'confidence' and 'confidences' as used in Canons 6 and 37 include more than specific matters of fact or information which come to the lawyer on a confidential basis. They include also intangibles arising from the very nature of the lawyer-client relationship which result from mutual discussion of the problems facing the client, consideration of the problems by counsel and the advice given thereon, the rationale of the solutions proposed and the legal techniques by which such solutions are arrived at."

We have before and shall hereafter use the term "confidential information" for those confidences, secrets and intangibles protected from disclosure by Canon 4 and the cases.

The courts have uniformly upheld a client's right to be protected against the possibility that confidential information acquired from the client by a lawyer may subsequently be used against the client. The rationale for this policy has recently been enunciated by this Court in Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973), where it affirmed the disqualification of an attorney who had acted for a defendant in a related case. The Court said (478 F.2d at p. 571):

> "A lawyer's good faith, although essential in all his professional activity, is, nevertheless, an inadequate safeguard when standing alone. Even the most rigorous self-discipline might not prevent a lawyer from unconsciously using or manipulating a confidence acquired in the earlier representation and transforming it into a telling advantage in the subsequent litigation."
>
> * * *
>
> "The dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case. These considerations require application of a strict prophylactic rule to prevent any possibility, however slight, that confidential information acquired from a client during a previous relationship may subsequently be used to the client's disadvantage."

In Richardson v. Hamilton International Corp., supra, 469 F.2d 1382 (3d Cir. 1972), cert. denied 411 U.S. 986 (1973) plaintiff had been associated with a law firm which had represented defendant, and had himself worked on matters relating to the subject to this suit, brought under Section 10-b of the Securities Exchange Act of 1934. The Court of Appeals affirmed a District Court decision that plaintiff was disqualified from maintaining the action, which he had designated a class action, stating (469 F.2d at pp. 1384-85):

> "The rationale underlying Canon 4 is the principle that a client should be encouraged to reveal to his attorney all possibly pertinent information. See Canon 4 of the Code of Professional Responsibility, Notes 1 and 2. A client should not fear that confidences conveyed to his attorney in one action will return to haunt him in a later one. It is readily apparent that if an attorney is permitted to reveal confidences 'the free flow of information from client to attorney, so vital to our system of justice, will be irreparably damaged.' United States v. Standard Oil Company, 136 F. Supp. 345, 355 (S.D.N.Y. 1955); see ABA, Informal Opinion No. 287 (1953).
>
> "Therefore, the courts, in order to protect the communications between attorney and client, have generally disqualified an attorney whenever the subject matter of the second representation is 'so closely connected with the subject matter of the earlier representation that confidences might be involved.' ABA, Informal Opinion No. 1233 (Aug. 24, 1972)."

Disqualification because of the risk that confidential information might be used against a client has not, as appellant urges, been limited to cases where the disqualified attorney "was in a position to use the confidences of his own client

against that client." (Brief, p. 17). Where an attorney is disqualified because he was in a position to use confidential information against his client, the disqualification of one or more attorneys with whom the first attorney has had close contact will follow where such disqualification is required to protect the client or to preserve the appearance of propriety.

Doe v. A. Corp., 330 F. Supp. 1352 (S.D.N.Y. 1971), aff'd per curiam sub nom. Hall v. A. Corp., 435 F.2d 1375 (2d Cir. 1972), is an example of a case in which both the attorney in possession of confidential information and other attorneys with whom he had close contact were disqualified. There an associate in a law firm bought stock in a client of the firm, and thereafter left the firm and brought, in his own name, a derivative suit against the client. The suit was based on information obtained in the course of performing legal work for the client. The District Court dismissed the complaint and sealed the record. It also disqualified plaintiff's co-counsel and enjoined plaintiff and his co-counsel from acting as counsel in any action arising out of the same facts or those on which the litigation was based. There can be no doubt that co-counsel was properly disqualified in Doe because of the risk that confidential information had been acquired by it from Doe which might then be used against Doe's former client.

Likewise, where a lawyer is disqualified because of the possession of confidential information, other lawyers in a professional relationship with him are also disqualfied. The

typical case involves the disqualification of a law firm because a partner or associate previously obtained confidential information from a former client in a related matter. See e.g., Laskey Bros. of West Virginia v. Warner Bros. Pictures, Inc., 224 F.2d 824 (2d Cir. 1955); W. E. Bassett Co. v. H. C. Cook Co., 201 F.Supp. 821 (D.Conn. 1961), aff'd. per curiam 302 F.2d 268 (2d Cir. 1962). In such cases the courts have imputed the actual knowledge of one lawyer in a firm to others in the firm because of their access to the confidential information in question as the result of their close professional contact with the lawyer possessing such information.

As noted by the court in W. E. Bassett Co. v. H. C. Cook Co., supra at page 825, continued representation by the challenged firm would

> "inevitably lead to suspicion and distrust in the minds of [the other parties] and the opportunity for misunderstanding on the part of the public which will lead to a lack of confidence in the bar."

This language was quoted with approval by this Court in affirming the decision below, 302 F.2d at 269.

As we shall show, the policy considerations which require the imputation of knowledge in the above cases are applicable here.

B. The Rabinowitz Firm Was Properly Disqualified Because Delulio's Knowledge is Imputed to It.

1. Delulio's knowledge should be imputed to the Rabinowitz firm because of the close professional relationship between them.

As we have shown above, where a lawyer in possession of confidential information is disqualified, other lawyers with whom that lawyer has a professional relationship are also disqualified. Here, Delulio could not have represented Hull because of her possession of confidential information acquired in the course of defending Celanese in this case.* And, had she joined the Rabinowitz firm as an associate or a partner, the firm would be disqualified because her knowledge would be imputed to the firm. The recent case of Gas-A-Tron v. Union Oil Company, 1974-2 Trade Cases ¶75,225(D. Ariz. 1974)makes this clear. There, the firm representing plaintiff (Berman) was disqualified because an associate in that firm (Burbridge) was found to have formerly represented defendants in related matters. There, according to the Court,

> "Without making a thorough investigation of the potential conflict between Mr. Burbridge's past and present employment, Mr. Berman hired Mr. Burbridge away from the McCutchen firm with the knowledge that he had been working for [defendants] Shell and Exxon."

The Court stated that the record disclosed that while Burbridge was with the McCutchen firm he had represented defendants in substantially related matters, and that:

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* Although we have shown that Delulio in fact received confidential information from her client, such a showing is not necessary to support disqualification here. It is presumed that in the course of representing an adversary on a related matter confidences were disclosed to the attorney bearing on the subject matter of the representation. T. C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F.Supp. 265 (S.D.N.Y. 1953).

> "Both Mr. Berman and Mr. Burbridge had a duty under the circumstances to make full, prior inquiry into the possible conflict and impropriety of their proposed relationship and a full disclosure of their planned relationship to the McCutcheon firm and to the attorneys for Exxon and Shell in these cases.
>
> * * *
>
> "Any doubts as to whether Mr. Burbridge's former representation of Shell and Exxon is substantially related to the present suits must be resolved in favor of Shell and Exxon and the Berman firm must be disqualified. . . .
>
> "The Courts as well as the bar have a responsibility to maintain public confidence in the legal profession. This means that a Court may disqualify an attorney not only for acting improperly but also for failing to avoid the appearance of impropriety. Richardson v. Hamilton International Corp., supra."

There is no essential policy difference between the situation in Gas-A-Tron and the situation presented here, where Delulio also entered into a close professional relationship with the Rabinowitz firm, that of lawyer and client.* The firm had the same access to confidential information as it would have had if it had employed Delulio, and the result should be the same.

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* In certain cases firms employing attorneys formerly employed by the firm representing their opponent have been permitted to show that, though related confidential information was possessed by other attorneys in the former firm, the attorney in question did not actually work on related matters and had therefore not acquired pertinent confidences which would be imputed to attorneys in the new firm. See, e.g. Silver Chrysler Plymouth Inc. v. Chrysler Motors Corp., 370 F.Supp. 581 (E.D.N.Y. 1973); United States v. Standard Oil Co., 136 F.Supp. 345 (S.D.N.Y. 1955). These cases have no application where, as here, the attorney whose knowledge is to be imputed has actually performed substantial work on the other side of the same case, and has therefore unquestionably acquired pertinent confidential information.

Indeed, the case for imputation and consequent disqualification is even stronger here than in Gas-A-Tron and similar cases. In Gas-A-Tron, the associate joining the firm had no direct financial interest in the outcome of the litigation. Here, Delulio has a direct financial stake in the outcome of the case in which she is a plaintiff, and consequently a greater motive to reveal confidential information than that of the associate in Gas-A-Tron, or any other lawyer similarly situated.

2. The facts of this case demonstrate a substantial risk of disclosure which justifies the imputation of the confidential information acquired by Delulio to the Rabinowitz firm.

Canons 4 and 9 of the Code are not limited to cases where actual disclosure of confidential information can be established. The policy of the canons is, rather, to protect clients against the risk of disclosure and consequent use against them of such information. Providing such protection precludes opportunities for misunderstanding by the public and a consequent lack of confidence in the bar and the administration of justice. The imputation to the Rabinowitz firm of confidential information acquired by Delulio in the course of her duties as attorney for Celanese in this matter is thus necessary because on the facts here there is a substantial risk of disclosure by Delulio of such information.

Although it was argued strenuously below that Delulio's blanket denials of all the affidavits submitted by her former

clients and co-counsel showed that she possessed no confidential information, appellant now concedes that Delulio must be deemed to possess such information.* See T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., supra.

In Emle Industries, Inc. v. Patentex, Inc., supra, this Court emphasized that the dynamics of litigation are such that

> "Even the most vigorous self-discipline might not prevent a lawyer from unconsciously using or manipulating a confidence acquired in the earlier representation and transforming it into a telling advantage in the subsequent litigation."

The possibility of unconscious disclosure is one consideration which requires the application of a strict rule to prevent any possibility that confidential information acquired from a client might subsequently be used against it. The facts of this case make clear that the possibility of unconscious, if not conscious, disclosure by Delulio is a real one.

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* In this case, the presumption of confidential communications is hardly necessary, for there is ample proof that such communications were actually made. Delulio's own letter to the Bar Associations Committee on Professional and Judicial Ethics indicates that she performed extensive work on the case. (131a). The affidavits of Mr. Sims (139a and 236a), Mr. Sands (146a), Mr. Brockman (242a), Mr. Wright (229a), Mr. Wylie (233a) and Mr. Edelson (101a and 207a) all show that Delulio reviewed confidential documents and attended meetings at which defense strategy was discussed. Her own memorandum of fact and law on the Hull case states that Delulio made what she describes as a "thorough review" of the relevant files, including specifically the files of the Celanese Law Department.

There is no doubt that Delulio had both the motive and opportunity to disclose to her lawyers, the Rabinowitz firm, consciously or unconsciously, facts which she had acquired while acting as a lawyer for Celanese with respect to equal employment opportunity matters generally, and to the Hull case in particular. Delulio did not consult the Rabinowitz firm solely for the purpose of vindicating her own rights. She consulted that firm for the purpose and with the effect of joining Hull's suit against Celanese and to endorse and support charges made by Hull and others. Delulio took the position that she, Hull and the other intervenors herein were all victims of the same pattern and practice of sex discrimination. This is demonstrated by the allegations of the amended complaint, the memorandum submitted by the Rabinowitz firm in support of the motion for intervention and Delulio's own statement.

The charges made by Delulio therefore substantially overlapped those made by Hull in her complaints to the EEOC and in her initial complaint in this action. They are the very charges which Delulio investigated when working as a lawyer for Celanese.

There can be no reasonable doubt that Delulio told the Rabinowitz firm of the basis for what she conceives to be her case against Celanese. And, since Delulio and Hull have both asserted that their cases are, in large part, based on the same facts with respect to Celanese's pattern and practice of discrimination, there is more than a possibility that confidential

information about the Hull case and related matters, unquestionably in Delulio's possession, was transmitted, consciously or unconsciously, to the Rabinowitz firm.*

It is argued, however, that the Court must accept the denials of the lawyers in the Rabinowitz firm and of Delulio that confidential information was disclosed. As a matter of law, however, such denials are unavailing. It is plain that in the interest of the appearance of propriety a law firm must be disqualified even if a lawyer states that he will not discuss or has not discussed confidential information in his possession with other lawyers in the firm. W. E. Bassett Co. v. H. C. Cook Co., supra. That rule is likewise applicable here.

Moreover, the facts justify the application of such a rule here. The denial of the Rabinowitz firm that confidential information was received by its lawyers from Delulio is based on the assumption that the lawyers ". . . would know immediately if they received any arguably confidential information or secrets." We disagree.

The lawyers in the Rabinowitz firm obviously cannot know the sources of statements made by Delulio or the occasions or circumstances under which information disclosed to them was

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* There is, of course, more than one route by which such information may have been transmitted. Delulio and the other intervenors admittedly discussed their case. Information revealed by Delulio to one or more of her co-plaintiffs may also have been transmitted to their joint counsel, the Rabinowitz firm.

obtained. They are therefore in no position to make a categorical and conclusory denial that no confidential information was disclosed to them.

Delulio's denial that she disclosed any confidential information is based on her assertion that her case is based not on any confidential or secret information but rather on Delulio's "experience and observation as an employee of the company" (159a).

All of Delulio's information was acquired in the course of her employment as a lawyer for her client, Celanese. Some of that information, such as that acquired in the course of her work on this case, is obviously confidential. Other information, possibly acquired under informal circumstances and not directly resulting from her work on this case, is also confidential, although less obviously so. Certain information, on the other hand, may not be confidential. Whether a fact is or is not confidential depends upon the circumstances under which that fact was obtained by Delulio.

It is at least questionable whether Delulio, or anyone else in her position would be able to recall the circumstances under which she obtained each fact and impression conveyed to her lawyer, and whether each such fact or impression was or was not confidential information. Greater questions are raised by Delulio's assertion that nothing she said or could have said would involve a disclosure of confidential information because she had none. At the very least, her conceded examination of all the files, including those of the Law Department, relating to the Hull case raises

grave doubts about such an assertion.

Under all the circumstances, there is plainly a risk that Delulio, in discussing the allegations of her proposed complaint with counsel, provided counsel with information regarding those allegations, and that she thereby disclosed facts learned in her capacity as lawyer for Celanese.

It is also argued that there is a presumption that Delulio did not violate her professional responsibility to Celanese, from which it follows that there can be no presumption of disclosure. This is beside the point. Had Delulio joined the Rabinowitz firm as a lawyer, that firm would have been disqualified irrespective of any such presumption. For the reasons already stated, it makes no difference that she has joined, as it were, as a client.

Moreover, as we have shown, even if Delulio made a conscious effort not to violate her professional responsibilities to her client, unconscious disclosure is entirely possible, and indeed probable. In fact, there can regrettably be no presumption in this case that Delulio refrained from violating her professional responsibilities to her client, because as we have shown, such violations plainly and undisputedly occurred.

There has, moreover, already been an improper disclosure of a confidence. Delulio was consulted by her client with respect to Marilyn Karnes. Delulio admits attending a

meeting relating to Karnes and states that she was told that ". . . the corporation hoped to encourage Ms. Karnes to leave." While the purpose of the meeting and the names of the persons attending the meeting are not privileged, statements made to Delulio, a Celanese lawyer, in the course of that meeting, are. Her disclosure is, therefore, improper.

Even more improper are Delulio's statements that Celanese has unlawfully discriminated against Hull. Such statements demonstrate a callous disregard for the fundamental obligations of loyalty, confidentiality and self-restraint.

In the light of the foregoing statements, and in light of Delulio's plain breach of her professional responsibilities to her client, there can be no presumption that Delulio failed to disclose confidential information. Indeed, the reasonable presumption is that Delulio disclosed whatever she knew.

It is further argued by appellant that the Rabinowitz firm cannot be disqualified in the absence of proof of an actual disclosure of confidential information by Delulio. It has been held, however, that no such proof is required because, in order to prove disclosure, a client would be compelled to reveal the very confidential information sought to be protected.

This question was dealt with by the Court in Emle Industries, supra, where it said (478 F.2d at p. 571):

> "Moreover, the court need not, indeed cannot, inquire whether the lawyer did, in fact, receive confidential information during his previous employment

> which might be used to the client's disadvantage. Such an inquiry would prove destructive of the weighty policy considerations that serve as the pillars of Canon 4 of the Code, for the client's ultimate and compelled response to an attorney's claim of non-access would necessarily be to describe in detail the confidential information previously disclosed and now sought to be preserved."

See also, Chugach Elec. Assoc. v. United States District Court, 370 F.2d 441 (9th Cir. 1966).

The Rabinowitz firm anticipates and rejects this argument (Appellant's brief, p. 23, fn. 7), but it is difficult to understand the rationale behind its position. It admits that an inquiry would bear on what Delulio told to her lawyers, but denies that such an inquiry would involve what Celanese told Delulio. This makes no sense.

Under plaintiff's proposal, we would have to question both Delulio and her attorneys in detail as to what was said between them. Furthermore, we would have to question Delulio, Hull and the other proposed intervenors as to what Delulio told them and what they, in turn, told the Rabinowitz firm. Celanese would then have to reveal to the Court the substance of any confidential communications acquired by Delulio which were then passed on to the Rabinowitz firm.

The negative impact of such an inquiry was compellingly described in the following quotation from Mr. Justice Taft, found in Drinker, Legal Ethics, at page 133:

> "To require the counsel to disclose the confidential communications of his client to the very court and jury which are to pass on the issue which he is making, would end forever the possibility of any useful relation between lawyer and client. It is essential for the proper presentation of the client's cause that he should be able to talk freely with his counsel without fear of disclosure . . ."

3. The cases cited in appellant's brief are distinguishable, and support defendants' position.

Appellant's brief appears to contend that there can be no appearance of impropriety under Canon 9 since the Rabinowitz firm was one step removed from Delulio's association with the Hull case. It relies in large part on cases where a court disqualified counsel who formerly acted for the opposing party, but refused to disqualify co-counsel. It is concluded from these cases that Canons 4 and 9 have "no application to an attorney who never represented the adverse party or was professionally associated with a former representative of the adverse party." (Appellant's brief, p.19)

Whether an attorney, to be disqualified in a case like this, must have been "professionally associated with a former representative of the adverse party," is an interesting but purely academic question in light of the facts of this case. For the Rabinowitz firm here was in fact professionally associated with Delulio, the lawyer for the adverse party. They were her counsel; she was their client. The very cases cited by

appellant indicate the importance of this fact. In addition, the factual distinctions between those cases and this one highlight the appropriateness of disqualification here.

American Can Co. v. Citrus Feed Co., 436 F.2d 1125 (5th Cir. 1971), cited at page 19 of the opposing brief, is one of the cases involving co-counsel referred to above. There plaintiff's local counsel, Allison, was the partner of an attorney, Ericksen, who had performed tax work for certain defendants. The District Court had, for this reason, disqualified both that attorney's firm and the Washington firm of Covington and Burling, co-counsel for plaintiff. The Court of Appeals held, however, that disqualification of the Washington firm was improper, since it involved a "double imputation" of confidential knowledge. The first such imputation, which founded upon the "professional relationship" between partners, was that the local counsel, Allison, was deemed to have the knowledge of his partner, Ericksen, with regard to confidences of the opposing party. The second, impermissible imputation, was that co-counsel, the Covington firm, had knowledge of the same information.

In the present case no such double imputation need be made. Delulio did not have a partner who represented Celanese; she did so herself and indisputably had obtained confidence from her client. And her professional relationship with the Rabinowitz firm clearly supports imputation of knowledge to them. Indeed, the case for imputation here is stronger than in the routine partnership situation. A client who is a litigant certainly has

a greater motivation to reveal confidences to her attorneys to gain her ends than does a lawyer whose only connection with a case is the involvement of a partner.

The court in the American Can case announced a subsidiary reason for its decision and in so doing implied that disqualification might be proper even if imputation in the absence of a professional relationship were involved. The court held that there was no finding that the work of the partner of the properly disqualified lawyer was substantially related to the case at bar, and went on to say:

> ". . . we do not determine whether disqualification of Miller [the Covington lawyer involved] and the Covington firm would have been correct if Allison had actual knowledge of information communicated to Ericksen [the tax partner] and substantially related to the American Can controversy." (at 1130)

The possibility of disqualifying co-counsel in other circumstances was thus clearly left open. As noted above, the case is far stronger here because the relationship of attorney and client, rather than co-counsel, is involved.

T. C. Theatre Corp. v. Warner Brothers Pictures, Inc., 113 F.Supp. 265 (S.D.N.Y. 1953), relied upon by the Rabinowitz firm, does not support the argument that no presumption of disclosure to the Rabinowitz firm should be made in this case. In T. C. Theatre an attorney named Cooke was held to be disqualified from representing plaintiff in a private antitrust suit because of his prior representation of one of the defendants

in a related case brought by the government. The court refused, however, to attribute Cooke's knowledge to his co-counsel, Kahan, who was also representing Cooke in a suit for fees against the defendant whom Cooke had formerly represented. This decision was explained in the following language:

> "Cooke's right to recovery of additional fees, if any, does not depend upon the disclosure of confidential communications, but, rather, upon the nature, extent and importance of the services performed by him. He could enumerate the various conferences with his client without detailing the matters which might have been discussed. It seems to me that Kahan's representation of Cooke could be just as effective without such a disclosure." (at 271-272)

The Rabinowitz firm is in a position unlike that of Mr. Kahan in the above case. It did not represent Delulio in a suit which had only a peripheral relation to her work on the Hull case, such as an action for fees. On the contrary, as shown above, the substantive charges raised by Delulio were in many respects the same as those made by Hull. Knowledge she gained in working on the Hull case might thus be of great value to both her and her attorneys in prosecuting her action. Delulio's motivation for conscious or unconscious disclosure of confidences, and the Rabinowitz firm's direct involvement in her substantive case, make the situation here readily distinguishable from that in T. C. Theatre.

The rationale for a presumption of disclosure of confidences where a professional relationship exists between two attorneys is well stated in Laskey Bros. of W. Va., Inc. v.

Warner Bros. Pictures, 224 F.2d 824 (2d Cir. 1955), cited at page 23 of the opposing brief. In that case plaintiff's attorney, Malkan, had formerly been partners with a lawyer possessing confidential information from the defendant. That partnership had been dissolved, however, before the case came to Malkan's new firm, and his former partner played no part in obtaining plaintiff as a client. The court held that under the circumstances Malkan was entitled to show that he had not received confidential information relating to defendant, and explained its ruling as follows:

> "Defendants contend that either receipt of confidential information should be conclusively presumed from the fact of partnership or alternatively Malkan should at least have the burden of rebutting such an inference. Within the framework of the original partnership the fact of access to confidential information through the person of the partner with such specialized knowledge is sufficient to bar the other partners, whether or not they actually profit from such access. Such a result, although an extension of the literal wording of Canons 6 and 37 of the Canons of Professional Ethics of the American Bar Association, is necessary to facilitate maximum disclosure of relevant facts on the part of clients. Once the partnership is dissolved, however, the inference from access to receipt of information, in a new case having no relationship to the old partnership, becomes logically less compelling and should therefore become rebuttable legally, lest the claim of disqualification becomes endless." (at 827)

The above language indicates that access to confidential information is the foundation for disqualifying all members of a partnership in the situation described. The same

reasoning requires disqualification of the Rabinowitz firm here since it has had access to confidences of Celanese in Delulio's possession. As explained above, the foundation for a presumption that such confidences were conveyed by a client to her attorneys is actually stronger than in the situation involving partners, because of the motivations involved. If the presumption is raised with respect to partners, it should, a fortiorari, be raised here.*

This Court's opinion in Meyerhofer v. Empire Fire & Marine Insurance Co., 497 F.2d 1190 (2d Cir. 1974) does not, as the Rabinowitz firm contends, support a restrictive view as to the application of Canon 9 to the present situation. Contrary to the representations at page 20 of the opposing brief, this Court did expressly consider whether Canon 9 justified disqualification of plaintiff's attorneys in that case. The attorneys in question were in possession of confidential information received from a former counsel for defendant. This Court found,

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* The Rabinowitz firm suggests that any problems created by its representation of Delulio have disappeared, since she is no longer their client. The court in Laskey Bros. made it clear that this contention must be rejected. It said that once a partner is disqualified for a particular case,

> "the subsequent dissolution of the partnership cannot cure his ineligibility to act as counsel in that case." (at 827)

The same rule should apply here, and the fact that the attorney-client relationship between the Rabinowitz firm and Delulio has been dissolved should not affect that firm's disqualification.

however, that the attorney had passed on the information to defend himself against charges of fraud. It therefore held that DR 4-101(C) of the Code, which permits disclosure of confidences necessary to defend against an accusation of wrongful conduct, excused the first attorney's conduct. The Court concluded:

> "Since [plaintiff's attorneys'] relationship with Goldberg [the lawyer accused of fraud] was not tainted by violations of the Code of Professional Responsibility, there appears to be no warrant for its disqualification from participation in either this or similar actions." (at 1196)

This case is just the reverse of Meyerhofer. For here there were clear violations of the Code by Delulio, as is shown at pages 21 to 29, supra. The "taint" in this case is substantial, and clearly creates the appearance of impropriety.

The other cases cited by the Rabinowitz firm in connection with the issues of Canons 4 and 9 and the imputation of confidences require little discussion. W. E. Bassett Co. v. H. C. Cook Co., 201 F. Supp. 821 (D.Conn. 1961) involved the disqualification of a lawyer whose partner had formerly represented defendant. The court there refused to disqualify co-counsel. As shown above, the fact that co-counsel was never professionally associated with a former representative of the adverse party distinguishes that case from this. Allied Realty of St. Paul, Inc. v. Exch. Nat. Bank of Chicago, 408 F.2d 1099 (8th Cir. 1969) involved a violation of former Canon 36, governing

the conduct of lawyers formerly in the public employ, and did not deal with the issues present here. Hawk Industries, Inc. v. Bausch & Lomb, Inc., 59 F.R.D. 619 (S.D.N.Y. 1973) involved a conflict due to a lawyer's representation of class and derivative plaintiffs in separate actions. No question concerning confidential information arose there. Finally, Fielding v. Brebbia, 479 F.2d 195 (D.C. Cir. 1973), though the opinion is not at all clear as to the facts, appears to have been a tort action accusing attorneys of using confidential information against a former client. The court there inquired into the communications made by the client to his lawyers to determine if there was any basis for the suit. No question of disqualification was involved.

POINT IV

APPELLANT'S ARGUMENTS THAT DISCLOSURE WAS JUSTIFIED AND HARMLESS ARE WITHOUT MERIT.

It is argued that disclosure by Delulio of confidential information is justified because (i) Celanese waived its objection to disclosure, and (ii) Delulio has a right to disclose in order to prosecute her claims. It is also argued by appellant that as a practical matter there is no harm to Celanese from such disclosures. We deal with each argument in turn.

A. Celanese Did Not Waive Its Objection to Disclosure

Appellant's waiver argument* is both factually and legally defective. The argument is founded on the assertion that Delulio was assigned to work on the Hull case in June 1973, after she complained to her superior about alleged sex discrimination. The undisputed facts are, however, that Delulio began such work in or about February 1973, before she made such a complaint.

Moreover, Canon 4 of the Code of Professional Responsibility makes it clear that such an assignment in and of itself could not constitute a waiver. DR 4-101 states that a lawyer may reveal confidences with the consent of the client only after

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* See footnote 13 at page 31 of appellant's brief and footnote 21 at page 46.

full disclosure to the client. No such disclosure to Celanese is claimed, no such disclosure was made and Celanese in no way consented to Delulio's improper activities. On the contrary, the poor judgment she has shown in disregarding her professional obligations to Celanese was one reason for her termination by Celanese.

B. Delulio Has No Right to Disclose Confidences to Further Her Claims

It is argued that confidential information may be revealed where an attorney would otherwise be deprived of the means of obtaining or defending his or her own rights. This principle, whatever its validity, has no bearing on Delulio's right to disclose confidences to Hull's lawyers in this case.

The Rabinowitz firm relies on Formal Opinion 250 of the ABA Committee on Professional Ethics, the source of the footnote to Disciplinary Rule 4-101. This opinion was written in response to an inquiry as to whether it was proper for an attorney to attach property of his client, the existence of which he discovered in the course of his professional employment.

The language in Opinion 250 at pages 46-47 of appellant's brief is preceded by a statement of the basic principle, which is not quoted in the brief, on which the exception to the rules against disclosure is founded:

> "However, the adjudicated cases recognize an exception to the rule, where disclosure is necessary to protect the attorney's interests arising out of the relation of attorney and client in which disclosure was made." (Emphasis added.)

This language shows that the exception does not apply to this case, for Delulio's interests here did not arise out of her attorney-client relationship with Celanese per se, but rather from her employee-employer relationship as defined by Title VII. This is an important distinction.

It makes sense to lift the ban on disclosure when the attorney's rights are based on the very relationship which the antidisclosure rule is designed to protect. Otherwise the relationship would be totally one-sided, with the attorney's obligations not met by corresponding obligations on the part of the client. The case of Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1974), cited at numerous points in the opposing brief, is an example of a case where proper use was made of the exception in question. The importance of the confidential relationship requires the exception in question to be strictly confined, however, and the ban should not be lifted to permit the attorney to attack the client on a collateral matter.

Thus an attorney for a bank who is also a borrower from the bank could not, after defending the bank in an action for deception in the charging of interest, sue the bank on

the same grounds on the basis of information gained in the course of his representation, since his interests arose from the borrower-lender rather than attorney-client relationship. So here Delulio's rights as an employee do not permit her to disregard her obligations as an attorney.

The exception referred to above is not applicable here for a second reason. We do not contend that a female lawyer may never sue her employer for sex discrimination, nor is this Court required to so hold. Nor are we required to face the issue of whether Delulio is barred under any set of circumstances from vindicating her personal rights under Title VII. That issue is not here presented.

As noted above, Delulio did not attempt here to vindicate her own individual rights on her own individual set of facts. Rather she sought to join Hull in bringing a class action on behalf of all women employees at Celanese's headquarters who have been discriminated against because of a pattern and practice of discrimination. Delulio's claim was that the same facts which establish Hull's case against Celanese also establish her case against Celanese. In such circumstances, Delulio, having rendered services in the defense of the action, was properly denied the right to intervene.

C. The Risk of Disclosure Of Confidences Is Real

Appellant argues that realistically, there is no prob-

lem regarding the use of privileged information against defendants (Appellant's brief, p. 33). It supports this argument by stating that privileged communications could not be introduced into evidence. The rules of evidence, however, give defendant no protection at all against the use of privileged communications by the Rabinowitz firm to assist it in preparing plaintiff's case. Such communications could obviously lead the firm to evidence which could be introduced. They could also provide assistance in framing discovery requests, questions on cross-examination, and litigation strategy in general. Defendants should not be exposed to this risk.

It is contended, further, that privileged communications would have little relevance to this action, since most of the evidence will be statistical. This argument is without merit. The very fact that such communications were made to Delulio in the course of her work on this case shows that such statements are related to the case. In any event much of plaintiff's complaint is directed toward specific alleged instances of discrimination where the motivation of Celanese employees would be at issue. The Rabinowitz firm admits that proof concerning motive and intent could be contained in privileged communications to an attorney.

Appellant also argues that the disclosure of confidences gained by Delulio from Celanese would cause no harm to Celanese, since the facts which were brought to her attention

will be obtained by counsel and plaintiff through the discovery process. There are two answers to this contention. First, the courts have consistently held that it does not matter whether information obtained in confidence from a client is available through other sources. For example, in Doe v. A. Corp., supra, the court held that an attorney in possession of confidential information from a former client was barred from suing that client in a related matter even if "the information disclosed is available through nonconfidential sources or was received by the attorney from a third party as well as from the client." (330 F. Supp. at 1355). Similarly, in Fleischer v. A.A.P., Inc., 163 F. Supp. 548 (S.D.N.Y. 1958), the court stated:

> "Although all of the information obtained by the attorney from his former client may be available to his present client through other sources or channels, the attorney will, nevertheless, be disqualified." (at 551).

Secondly, it is obvious that confidences which Delulio has disclosed could involve more than hard facts that are available through discovery. Assume, for the sake of argument, that Mr. Sands, the Director of Minority Relations for Celanese, told Delulio of his opinions with regard to the strengths and weaknesses of Celanese's performance with regard to equal employment opportunity. Mr. Sands could not be forced to respond to questions concerning his opinions in the course of a deposition. Yet knowledge of such opinions might be very helpful to counsel

in determining where to concentrate their discovery efforts. See Marco v. Dulles, 169 F. Supp. 622 (S.D.N.Y. 1959), discussed at p.31, supra.

POINT V

DISQUALIFICATION DOES NOT INFRINGE UPON PLAINTIFF'S CONSTITUTIONAL RIGHTS.

The Rabinowitz firm contends that "[t]he order of disqualification deprives Hull and the intervenors of their fundamental right to be represented by the attorneys of their choice." (Appellant's brief, p. 29-30). Their brief cites no case, however, and we have found none, where any such right has been held to justify representation which offends against the Code of Professional Ethics.

The First Amendment to the Constitution, invoked at page 32 of the appellant's brief, does not give plaintiff an absolute right to retain the attorneys of her choice.

In an abundance of decisions, the Supreme Court has established firmly that even activities protected by the First Amendment are subject to limitation. E.g., United States Civil Service Comm'n. v. Letter Carriers, 413 U.S. 548, 567 (1973); Times Film Corp. v. Chicago, 365 U.S. 43 (1961); Beauharnais v. Illinois, 343 U.S. 250 (1952); Dennis v. United States, 341 U.S. 494 (1951); Cox v. New Hampshire, 312 U.S. 569 (1941).

Where activities otherwise protected by the First Amendment conflict with substantial competing public policies, the procedure established by the Supreme Court requires that the countervailing interests be weighed. E.g., Cox v. Louisiana, 379 U.S. 559 (1965); Poulos v. New Hampshire, 345 U.S. 395 (1953); Prince v. Massachusetts, 321 U.S. 158 (1944). These cases demonstrate that when this balancing process has been applied, activities protected by the First Amendment have often been circumscribed.*

A state's broad right to regulate so as to uphold the integrity of the Bar has been upheld in a series of cases against First Amendment challenges. In the cases of Konigsberg v. State Bar, 366 U.S. 36 (1961), and In re Anastaplo, 366 U.S. 82 (1961), the Court employed the approach of weighing the competing interests of the First Amendment and the valid state interest of "determining the fitness of applicants for membership in a profession in whose hands so largely lies the safekeeping of the country's legal and political institutions." Konigsberg v. State Bar, supra, 366 U.S. at 52. As it has done in so many other decisions, the Court emphasized that the First Amendment is not without limit; and, significantly, made clear that its

* The authorities cited by plaintiffs are in accord. NAACP v. Button, 371 U.S. 415 (1963) endorsed the procedure of balancing interests and observed that "'a subordinating state interest which is compelling'" justifies regulation of First Amendment activity (at 439). The Court in the Button case recognized that protecting the attorney-client relationship was such a subordinating interest.

decisions upholding State actions against First Amendment attack have not always turned upon a conclusion that the conduct regulated was without the purview of the Amendment.

The Court said (at 49):

> "At the outset we reject the view that freedom of speech and association (NAACP v. Alabama, 357 U.S. 449, 460), as protected by the First and Fourteenth Amendments, are 'absolutes' not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment." (Footnote omitted. Emphasis added.)

Both Konigsberg and Anastaplo concluded that the challenged state rules served public policies that outweighed the First Amendment interests asserted. These cases provide ample authority for the proposition that constitutionally protected activity can be compelled to give way before policies relating to regulation of professional conduct of attorneys.

The public policies embraced by Canons 4, 5 and 9 override Hull's interests in retaining the Rabinowitz firm. The various cases involving disqualification discussed above show that where there is a violation or a serious risk of a violation of these Canons courts have always held that the right of a litigant to choose its counsel is subordinate to these policies. As defendants have demonstrated, there is a grave

danger here that the evils sought to be prevented by Canons 4, 5 and 9 will occur, if indeed they have not already. Delulio retained her client's adversary's counsel and sought to join as a plaintiff in this action in which she has served as defense counsel. It is not merely possible that she received confidential communications; she was in fact privy to communications concerning the legal strategy and tactics Celanese seeks to utilize in its defense. It is not merely possible that confidences were divulged to her counsel; it is difficult to see how disclosure could have been avoided.

The ethical precepts at issue here, undivided loyalty to a client and the sacred confidentiality of client communications, are not mere technicalities or formal scholasticisms -- they are fundamental to our legal system. Effective assistance of counsel obviously requires that the attorney be fully and candidly informed by his client. The rule against an attorney's divulging confidences serves to encourage and secure this free flow of information. Without assurances of complete confidentiality, professional assistance of counsel is meaningless.

The term "civil rights" is not a magic word the invocation of which requires the court to ignore the obligations under consideration here.* It is obvious that disqualification

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* A series of Supreme Court cases has upheld restrictions of various kinds on the protected activities of persons asserting their civil rights. E.g., Grayned v. City of Rockford, (footnote continued on next page)

will not deprive Hull of her remedies under Title VII. Under the circumstances there can be no doubt that the ethical obligations in question are, in the language of First Amendment jurisprudence, "overriding," "compelling," "subordinating" and "fundamental." Disqualification was properly founded on Delulio's improper behavior.

(footnote continued from previous page)
408 U.S. 104 (1972); Cameron v. Johnson, 390 U.S. 611 (1968); Adderley v. Florida, 385 U.S. 39 (1966). In the context of racially discriminatory employment practices, Ford v. Boeger, 362 F.2d 999 (8th Cir. 1966), cert. denied, sub nom., Grand v. Boeger, 386 U.S. 914 (1967), held that such discrimination in hiring cannot be fought by obstructing entrances and exits of the employer's place of business.

CONCLUSION

On the basis of the facts of this case, the District Court did not abuse its discretion in disqualifying the Rabinowitz firm. Its order of disqualification should be affirmed.

Respectfully submitted,

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EEOC AND TITLE VII

DONATA DELULIO AND JOAN HULL

The Civil Right Act of 1964 made it a Federal offense to discriminate in employment on the basis of sex. Today corporations are paying out millions of dollars in judgments for non-compliance with Title VII, and the Equal Employment Opportunity Commission has pledged that every major corporation in the country will comply with this law; yet much of American industry has failed to respond. After 10 years of government intervention, of consciousness raising, and of a growing body of significant - and costly - court decisions, where do professional women stand in terms of equal opportunity in employment and what options are open to them under the law?

Six professional women have filed suit against Celanese Corporation, a major chemical and fiber producer, and two of them will speak at our next luncheon, on Wednesday, May 29 - Donata Delulio, Associate General Counsel, and Joan Hull, Marketing Manager, who has already won a case against Celanese and has now brought her suit into Federal Court. They will discuss their reasons for filing formal complaints against their current employer, the company's reaction, and what other women can and should do under existing legislation to insure themselves equal employment opportunity. Whether viewed as an employer (potential cost liability) or as an individual (how and what you can do against discrimination), this discussion promises to be both stimulating and informative. We urge all members to attend!

Our luncheon will be held at noon on Wednesday, May 29, at Oscar's Delmonico, 56 Beaver Street. Prices will be $6.00 for members and $9.00 for guests; checks and registration forms should be sent to Gail Hartman at Bear, Stearns & Co., 55 Water Street, New York 10041, by Monday, May 27. Hope to see you on the 29th.

Best regards,

Mary Grace Butler

Mary Grace Butler

EXHIBIT "A"

New York Times

Celanese Gets Proposals of Feminists

One Resolution Seeks Woman as Director

By MARYLIN BENDER

The first shareholder proposals to be submitted by feminists at a major company's annual meeting were voted on yesterday by stockholders of the Celanese Corporation at the Essex House.

During the discussion the 56-year-old chairman and chief executive, John W. Brooks, was chided by a male member of a church group supporting the resolutions for his "seeming antagonism" to the women stockholders.

The resolutions, calling for nomination of women to the board of directors, for a report to shareholders on employment practices and for cumulative voting, were defeated as expected. But under the rules of the Securities and Exchange Commission, they received enough votes to be resubmitted next year.

The first two proposals received approval of 5.4 per cent and 4.6 per cent, of the shares voting, respectively. The cumulative voting resolution, which has long been a favorite of corporate meeting goers likes the brothers Lewis and John Gilbert, and which feminists see as a chance to get their representatives elected to boards, received 14.7 per cent of the nearly 10 million votes cast.

Proposals Supported

Representatives of the National Organization for Women and of the National Council of Churches spoke in support of the proposals, which were presented by Joan Hull, a merchandising manager in Celanese's fibers division. Last summer, Miss Hull instituted a class action in Federal court charging

Continued on Page 60, Column 1

The New York Times/Edward Hausner

Joan Hull, left, and Donata Delulio at Celanese Corporation meeting. Top: John W. Brooks, chairman, on the dais.

Celanese with sex discrimination. The litigation involves five other professional employes, one of whom, Donata Delulio, is an associate general counsel for the corporation.

Mr. Brooks's attitude toward the women contrasted with his patience toward John Gilbert, whose proposal for preemptive rights for stockholders was approved by 5.8 per cent of the stockholders, and toward Morton Adler of Rye, N. Y., who complimented Mr. Brooks for "the way you've turned the company around."

In his speech to the shareholders, Mr. Brooks announced record first-quarter income for the corporation, which has undergone restructuring of its troubled phases during the last five years.

Lawyer Recruited

When Carole De Saram, a vice president of NOW asked Mr. Brooks how many women served on the Corporate Equality Committee of the board of directors, which monitors the company's affirmative action programs, he answered: "As you well know before you asked the question, there are no women on the board of directors."

"We are not going to change our procedures because we are doing the right thing," he declared. Later he said that "a lawyer is telling her what to ask."

Another NOW member, Betty Harragan, was critical of the past that Celanese had only 3.6 per cent of women in managerial and supervisory positions last year. She termed it "low quality performance" by the company. Mr. Brooks retorted, "I know you are here to stir up this problem and are not interested in our answers."

Timothy Smith, representing the division of church and society of the National Council of Churches, chided Mr. Brooks for "your seeming antagonisms to our women friends."

"I don't appreciate your attempt to scapegoat the women here," Mr. Smith said.

Confidence Expressed

"You need a little bit of ferment to bring about change."

Two directors expressed confidence in the corporation's intentions to advance female and minority employes. "The heart of management of the company is in the right place on this issue," said Grayson Murphy, a partner in Shearman & Sterling. Vernon E. Jordan Jr., executive director of the National Urban League, Inc., and the only black on the board said: "I think there is a sense of genuine effort. Obviously nobody is satisfied with the results."

Celanese reported first-quarter income before extraordinary items of $1.37 per common share, equal to $120-million, on sales of $440 million. Earnings were 38 per cent higher and sales were 15 per cent higher than in the first three months of 1973.

"Demand for our entire product line remained firm during the first three months of 1974," Mr. Brooks said. "There is every indication that our business will continue to be strong during the coming months." However, he said he did not expect the same rate of profit increases to continue into the second quarter.

EXHIBIT "B"

EXHIBIT "B"

E WALL STREET JOURNAL,
Friday, August 2, 1974

Running Scared

Costly Lawsuits Spur Companies to Step Up Efforts to End Bias

Equal-Employment Officers Gain Status; Consultants Locate Vulnerable Spots

'Problem of Dollars & Cents'

By Mary Bralove
Staff Reporter of The Wall Street Journal

It's hardly a best-seller, but there's one book being well-thumbed by top-echelon corporate managers these days. It's titled "Affirmative Action and Equal Employment," and it was published earlier this year by the U.S. Equal Employment Opportunity Commission. Designed as a brief employer's guide to the tangled thicket of regulations governing the hiring and advancement of women and minorities, the summary is bound in two volumes and runs 158 pages.

Specifically, it warns: "If a statistical survey shows that minorities and females are not participating in your work force at all levels in reasonable relation to their presence in the population and the labor force, the burden of proof is on you to show that this is not the result of discrimination, however inadvertent."

Fearful of winding up on the losing end of a federal discrimination suit, alarmed by the prospect of costly litigation and even costlier settlements, the nation's corporations are hastily mustering that proof. They're spending huge sums to ferret out and eliminate questionable—or downright discriminatory—hiring and promotion practices. And in doing so, many are making fundamental changes in the way they do business.

Too Little, Too Late?

The push to make employment practices more equitable has come recently, along with the dawning realization that much-ballyhooed corporate affirmative-action programs haven't stemmed the gathering tide of employe discrimination complaints.

Three years ago, for example, Celanese Corp. formed a blue-ribbon committee of its top brass to oversee such a program after Joan Hull, a manager in the company's fibers division, filed a sex-discrimination complaint against the company with the New York State Division of Human Rights. But the committee's efforts weren't sufficient to prevent Miss Hull from bringing her case to court last summer. Surprised, Celanese turned the suit over to its legal department to determine whether the case had merit. Donata Delulio, Celanese's associate general counsel, took one look at the suit and promptly filed a sex-discrimination complaint on her own behalf with the EEOC, as the federal agency is commonly called.

Nor is Celanese the only company facing defections from the ranks. Employes at Xerox Corp., International Business Machines Corp., General Electric Co.—to name a few—charge that employers' equal-employment timetables and goals have been too little, too late. They, too, are agitating and bringing suit.

"Every company in this country has this problem," says Todd Jagerson, president of EEO Services, a division of the consulting firm of Boyden Associates Inc. in New York. "It's not if you have problems, but where. It's not if you're going to be confronted, but when. And it's not if it's going to cost money, but how much."

A Sensitive Nerve

Frequently, it costs a lot. To defend itself in two recent discrimination complaints, Celanese says it spent $100,000 in legal fees alone. Others close to the two cases say Celanese's legal expenses were closer to $300,000. And if Celanese or any other company loses a case, it can be made to pay for past raises and promotions denied employes because of alleged discrimination. These back-pay awards reach back two years before the complaint was filed. In addition, the employer is saddled with the plaintiff's legal fees. Mr. Jagerson says one of his clients confided that if it loses its current sex-discrimination suits, it will be liable for almost $250 million.

The high-priced offensive to end bias has been a bonanza for consulting firms that help companies implement equal-employment programs. In the past two years, a dozen such concerns have sprung up, and already most are swamped with business. Although they differ in the type of services they provide, most consultants home in on a particularly sensitive corporate nerve: fear of costly settlements should the client lose a suit.

"It's a business problem of dollars and cents and should be approached as such," says Barbara Boyle, a partner in the consulting firm of Boyle-Kirkman Associates Inc. Her own scare tactics include showing clients a pamphlet distributed by the National Organization for Women that gives women step-by-step guidance on how to sue their employers.

The Stakes Are High

Companies pay consultants anywhere from $10,000 to $100,000 to find out where they're vulnerable and how much it could cost them. Boyle-Kirkman, for instance, charges a company with 500 employes $22,000 to conduct such a survey.

Last year, a Northeastern consumer-products concern called in Boyle-Kirkman to assess its potential vulnerability to back-pay suits. After studying one department, Boyle-Kirkman found that if a class-action suit was filed, the company could be liable for $1 million in back-pay awards in that department alone. If the action included all departments, the client could be faced with a settlement as high as $15 million, Boyle-Kirkman determined.

With the stakes so high, most big companies by now have appointed at least one equal-employment officer. Within the last two years, American Telephone & Telegraph Co., the nation's largest corporate employer, expanded its equal-employment staff to 300 people from 50 and expects to add more. (With good reason: After making

EXHIBIT "C"

Continued From First Page

$45 million settlement with the EEOC last ear covering hourly employes, Ma Bell greed to another $30 million settlement in lay, this time to cover management em-loyes.) Moreover, these departments are etting more clout: The equal-employment fficer for a large company saw his budget lossom to $500,000 from $50,000 in the past wo years. Another's budget rose 20% to ver $1 million in the same period.

The climate of urgency has in some ases propelled the equal-employment offi-er out of obscurity into the limelight. In ears past, when equal-employment was mped in with other corporate "social-re-onsibility" programs, the staff member ssigned to the task frequently occupied an t-of-the-way office isolated from top man-gement. Explaining the frustrations of this le, Mr. Jagerson notes, "The EEO fficer knew that he was sitting on a keg of ynamite. He knew that when the $30 mil-on suit hit, he'd be talking to the chairman the board for the first time—with the hairman asking, 'Why did you let it appen?' "

One former equal-employment officer, ho quit after being bogged down in corpo-te oblivion for a year and a half, de-ribes it this way: "It's a hellish job. ou're selling something people don't want buy."

sing Stars

Now, however, more big companies are ying, and most equal-employment officers longer regard themselves as the forgot-n man or woman. One who works for a ajor airline says that when he took the job 1972, he spent most of his time passing emos up and down the office pipeline. "In-riably, whatever I had written got wa-red down," he says. But things began to ange last year. His staff was doubled, and r the first time, he got a budget of his n. Now, he says, "I have the freedom to whatever I please without clearing it st with a number of people." Recently, s company made equal opportunity its No. corporate goal—second only to making a ofit.

To get people qualified to handle the expanded responsibility of such posts, corporations are finding they must pay heftier salaries. Executive recruiters say that personnel people with a knowledge of equal-employment law currently command salaries ranging up to $60,000. Four or five years ago, these jobs went for a maximum of $30,000.

In some cases, the new affirmative-action push has forced a costly overhaul of the data-processing systems that companies use to keep track of employe records. Some concerns took this step out of desperation, in an attempt to satisfy the overlapping, changing and increasingly demanding reporting requirements of federal, state and city watchdog agencies. "Every time you think you've got everything they want, they ask for something else," says one weary personnel director. "The regulations about the number of minorities, women, veterans and disabled you have or don't have are enough to drive anybody crazy."

Administrative Burden

One estimate has it that AT&T spends over $3 million annually just to collect data needed to file the required progress reports with the EEOC. And, according to Richard Allen, director of employe relations at Pfizer Inc., most big firms spend over $1 million a year compiling these reports.

At International Paper Co. and at CBS Inc., sophisticated new computer systems are used to spot departments where the proportion of minorities and women is especially low or high. CBS stores records of each employe's experience, education, job goals and geographical preference in the computer. Its system, which cost about $70,000, sorts through records on the company's 29,000 employes whenever a new job opens up. After assessing the data—updated annually by each employe—it prints out a list of potential applicants. The computer search is run before any applicants outside the company are considered for the job.

Both CBS and Polaroid Corp. maintain a job-posting system, in which all employes are routinely notified of all job openings throughout the company. If a mechanic position opens up in, say, Polaroid's Norwood, Mass., division, a mechanic—or non-mechanic—in any division can apply for the job. Though the system is more equitable than past procedure, it is cumbersome for managers: "It's a cardinal sin here to have a job filled without this process," says Thomas Wyman, senior vice president at Polaroid. "Obviously it's inefficient, and the burden it imposes on an administrative operation is tremendous."

To help upgrade female employes with an eye to eventual promotions, Pfizer has launched an experimental education program in two of its units. The company is sending 18 secretaries—a group usually ignored in corporate job-training programs—to school at Marymount Manhattan College in New York City. The women take a speaking and reading, a writing and a cultural course. The experiment differs from most other job-training programs in that courses aren't all job-related and employes attend classes on company time. Pfizer picks up the entire $10,000 tab for the entire program.

Though participants are generally satisfied, some women at Pfizer complain that the experiment is merely a cosmetic approach to the problem. "They tend to do these short, sexy programs and not undertake any large, expensive ones," grumbles one Pfizer employe. "Equal employment is still pretty much a joke around here."

Many firms have received complaints that their application forms and tests convey an entrenched bias against women. Such documents are getting thorough scrutiny, and many are being revised. The brokerage firm of Merrill Lynch, Pierce, Fenner & Smith Inc. recently dropped a question from the application it requires all potential account executives to complete. The question read: "What are the most important qualities in a woman?" The answers "dependency" and "affection" received two points. "Beauty" chalked up one point. But no points were scored if the applicant checked the answers "intelligence" or "independence."

Equal-employment consultants agree that reshuffling a department or rewriting an application form is the easy part of their jobs. Far more difficult, they say, is changing biased attitudes still held by many managers. Mr. Jagerson, however, has found that in such cases, strong measures sometimes work. One of his clients, for example, has begun tying a manager's annual bonus to his success in implementing equal-employment programs. "One guy got $15,000 knocked off his bonus because of his poor performance in the EEO area," Mr. Jagerson says. "The word spread faster than electricity. It was incredible the change that took place in that company."

EXHIBIT "C"

People and Business

Donata Delulio, an associate general counsel for the Celanese Corporation who sued the company, charging sex discriimination, on Nov. 29, and who was dismissed Dec. 5, can still be found at her desk at corporate headquarters.

As a member of the corporate legal staff, Miss Delulio had represented Celanese in a long-standing battle with Joan Hull, a merchandising manager in its fibers division who charged the company with sex discrimination. In the process, Miss Delulio's consciousness apparently was raised.

She tried last February, to intervene in the class action Miss Hull instituted against Celanese in July, 1973.

Last May, a Federal judge denied Miss Delulio's motion to intervene.

So Miss Delulio filed her own suit and was dismissed. On Dec. 13, she obtained an injunction that keeps her on the Celanese payroll until her case is tried. The trial will begin Feb. 17 in Federal Court here.

Yesterday, Robert Longman, general counsel for Celanese and Miss Delulio's superior, said, "I felt I had very proper reasons for discharging her. The reasons had nothing to do with her being a woman or that she was in litigation with the company." He declined to say what the reasons were.

THE NEW YORK TIMES
December 24, 1974
Pages 25 & 31

EXHIBIT "D"

(The article is in error in that no injunction was issued and Ms. Delulio has left Celanese.)

Service of 2 copies of the
within BRIEF is hereby
admitted this 10th day of
Jan. 1975

Signed A. Marula

Attorney for ~~Plaintiff-Appellant~~

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